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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1070.

JOSEPHINE M. MOSS, Administratrix of the Estate of NICHOLAS JOHN MOSS, deceased, *Petitioner*,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *Respondent*.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 21-22) is reported in 158 Fed. (2d) 86. The opinion of the District Court (R. 4-6) is reported in 68 Fed. Supp. 740.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240a of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. 350.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals correctly construed its own mandate as directing the District Court to enter a judgment for the defendant *non obstante veredicto.*

STATEMENT.

The petitioner Josephine M. Moss, Administratrix of the estate of Nicholas John Moss, deceased, sued the respondent herein in the United States District Court for the Northern District of Indiana to recover damages for the death of her decedent which was alleged to have been negligently caused by the respondent. At the conclusion of the petitioner's case the respondent filed a motion for a directed verdict which was overruled.[1] At the conclusion of all the evidence, the respondent again filed a motion for a directed verdict which was overruled.[2] On January 21, 1944, the jury returned a verdict for the petitioner in the amount of Seventy-five Hundred Dollars ($7500) upon which judgment was entered.[3] On January 28, 1944, the respondent, in accordance with Rule 50b of the Rules of Civil Procedure, filed a motion to set aside the verdict and the judgment and to enter a judgment for respondent in accordance with its motion for a directed verdict filed at the conclusion of all of the evidence, and in the alternative, for a new trial. These motions were denied.[4]

The respondent thereupon appealed to the United States Circuit Court of Appeals for the 7th Circuit, assigning as error, among other things, the overruling of the motion for a directed verdict and the denial of the motion for judgment

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[1] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 227.

[2] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 228.

[3] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 230.

[4] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 236.

notwithstanding the verdict.[5] On January 3, 1945, the Circuit Court of Appeals, with one judge dissenting, reversed the judgment on the ground that as a matter of law, the petitioner's decedent was guilty of contributory negligence. *Moss* v. *Pennsylvania Railroad Co.*, 146 Fed. (2d) 673. A petition for a writ of certiorari was denied by this Court on May 21, 1945, *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861.

On May 29, 1945, the mandate of the Circuit Court of Appeals for the 7th Circuit was filed in the United States District Court for the Northern District of Indiana (R. 1). The mandate of the Circuit Court of Appeals directed the District Court to award the respondent its costs and to take such further proceedings "as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding". (R. 1-2).

The respondent moved the District Court to set aside the verdict and to enter a judgment for the defendant (R. 2-3). The District Court, after hearing argument by both parties, in a memorandum opinion, dated March 4, 1946, entered judgment on the mandate in favor of the respondent (R. 4-6.) The petitioner appealed and the Circuit Court of Appeals on November 6, 1946, unanimously affirmed the action of the District Court, stating that the District Court had "correctly construed the opinions and mandate" (R. 21-22).

ARGUMENT.

I

The Circuit Court of Appeals did not decide any important question of Federal law that requires or deserves consideration by this Court. The only question decided by the Circuit Court of Appeals was whether its mandate had been correctly construed and applied by the District Court.

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[5] *Moss* v. *Pennsylvania Railroad Co.*, 325 U. S. 861, No. 1182 October Term, 1944, R. 238-9. There were eleven assignments of error in all.

There is no dispute that the Circuit Court of Appeals in its mandate could have expressly directed the District Court to enter a judgment for the respondent. *Montgomery Ward* v. *Duncan*, 311 U. S. 243, 254; *Capital Transit Company* v. *Gamble*, U. S. Ct. of Appeals for the District of Columbia, No. 9244, decided March 10, 1947; Cf. *Cone* v. *W. Va. Pulp and Paper Co.*, No. 184, Oct. Term, 1946, decided by this Court March 3, 1947, 15 U. S. Law Week 4278.[6]

The District Court, after a hearing, concluded that the mandate of the Circuit Court of Appeals, read in the light of the opinion of that Court, directed the District Court to enter judgment for the respondent (R. 6). Upon appeal, the Circuit Court of Appeals unanimously affirmed this construction of its mandate (R. 22).

This Court said in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141:

> "* * * the Court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes."

In this case, the Circuit Court's construction of its own mandate was not inconsistent either with its own opinion or with any applicable rule of law. On the contrary, the construction of the mandate adopted by the Circuit Court of Appeals would seem to be required by its own conclusion that the petitioner's decedent had been guilty of contributory negligence as a matter of law. The Circuit Court of Appeals' construction of its mandate does not raise any general question either of substantive or procedural law, or any question with respect to the relationship between

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[6] In the *Cone* case this Court held that an appellate court could not direct the entry of a judgment notwithstanding the verdict if no motion for such a judgment had been made in the District Court within the ten-day period prescribed by Rule 50b. That question does not arise in the instant case because the respondent filed a motion for judgment within ten days after the entry of the jury's verdict. *Moss* v. *Pennsylvania Railroad Co.*, No. 1182 October Term, 1944, R. p. 230.

the appellate and the trial court that deserves decision by this Court. Compare *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *National Labor Relations Board* v. *Donnelly Garment Co.*, Nos. 38 and 39, October Term, 1946, decided by this Court on March 3, 1947, 15 U. S. Law Week, 4273.

The questions that petitioner asserts are raised by its petition all ultimately involve attacks upon the Circuit Court's construction of its own mandate. Thus the petitioner's assertion that the Circuit Court of Appeals has attempted to redelegate to the District Court the appellate court's admitted power to direct the entry of a judgment for the defendant, and the assertion that the defendant's motion for a verdict was not reinstated by the reversal, both assume that the Circuit Court of Appeals misconstrued its own mandate.

The petitioner asserts that she has been deprived of her constitutional right to a jury trial. But even if it is assumed that the Circuit Court of Appeals erroneously construed its own mandate no constitutional right of the petitioner has been infringed. The Circuit Court of Appeals could direct the entry of a judgment for the respondent without invading the petitioner's constitutional right to a trial by jury. See *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654. Furthermore, if the Circuit Court had in fact remanded the case generally, the District Court, exercising its discretion in the light of the opinion of the Circuit Court of Appeals, could have directed a judgment for the respondent without depriving the petitioner of any constitutional right. See *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654; *Cone* v. *West Virginia Pulp and Paper Co.*, No. 184, October Term, 1946, decided by this Court March 3, 1947. The error that petitioner asserts the Circuit Court committed in construing its own mandate was wholly procedural and does not raise any question of substantive law.

II.

There is no conflict among the Circuit Courts of Appeals upon the question raised by the petition herein. Petitioner, in arguing that a conflict exists, cites *Illinois Power and Light Company* v. *Hurley,* 49 Fed. (2d) 681 (CCA 8th); *Madden Furniture Co.* v. *Metropolitan Life Insurance Company,* 127 Fed. (2d) 837 (CCA 5th); *Roth* v. *Hyer,* 142 Fed. (2d) 227 (CCA 5th); and *Fleniken* v. *Great American Indemnity Company,* 142 Fed. (2d) 938 (CCA 5th). These decisions are not in conflict with the decision of the Circuit Court of Appeals in this case. In each of those decisions a Circuit Court of Appeals, as in this case, passed upon the construction and application of its mandate that had been adopted by the District Court. The facts in each of the cases were such that the construction of its own mandate adopted by the Circuit Court of Appeals was not in any way inconsistent with the decision of the Circuit Court of Appeals in this case or with the principles followed by the Circuit Court of Appeals here in construing its mandate.

Illinois Power & Light Company v. *Hurley,* 49 Fed. (2d) 681, was decided in 1931 prior to the adoption of the Federal Rules of Civil Procedure. There the defendant had made a motion for a directed verdict at the close of all of the evidence. The reports indicate that no motion for judgment notwithstanding the verdict was made after the verdict had been returned and entered. See *Illinois Power & Light Company* v. *Hurley,* 30 Fed. (2d) 905, 906; 49 F. 2d 681. In those circumstances, unlike the instant case, there was no motion for judgment after the verdict which the Circuit Court of Appeals could have considered. Even had Rule 50b been in effect at that time the defendant would not have complied with its terms. Compare *Cone* v. *West Virginia Pulp and Paper Co.,* No. 184, October Term, 1946, decided by this Court March 3, 1947. Furthermore, in that case the Circuit Court of Appeals had reversed on the general ground that the evidence was insufficient to go to the jury and had not

ruled that as a matter of law plaintiff had no right to recover. The mandate of the Circuit Court of Appeals remanded the case for further proceedings in harmony with its opinion. The Circuit Court of Appeals held that the District Court had correctly interpreted the mandate as authorizing a new trial. The construction of its own mandate adopted by the Circuit Court of Appeals in that case is consistent with the construction adopted by the Circuit Court of Appeals here.

In *Madden Furniture Co.* v. *Metropolitan Life Insurance Company*, 127 Fed. (2d) 837, the plaintiff had sued the defendant on certain insurance policies. At the close of all of the evidence the defendant had moved for a directed verdict. The motion was denied and there was a verdict and judgment for the plaintiff. The defendant then moved for judgment notwithstanding the verdict and this was denied. The defendant appealed to the Circuit Court of Appeals for the Fifth Circuit *but it did not assign as error the action of the District Court in overruling the motion for a judgment notwithstanding the verdict.* The Circuit Court of Appeals for the Fifth Circuit reversed the judgment on the ground that the trial court's instructions to the jury did not correctly submit the question whether certain representations made by the insured were in fact false. *Metropolitan Life Insurance Co.* v. *Madden*, 117 Fed. (2d) 446. Upon remand, the District Court denied a motion for a new trial made by the plaintiff and entered judgment for the defendant notwithstanding the verdict. Upon appeal the action of the District Court was reversed by the Circuit Court of Appeals for the Fifth Circuit on the express ground that on the previous appeal the Court of Appeals had not considered or ruled upon the motion for judgment notwithstanding the verdict, which had not been specified as error, but had ruled only on alleged errors that had occurred prior to the verdict. *Madden Furniture Co.* v. *Metropolitan Life Insurance Co.*, 127 Fed. (2d) 837. In this case, by contrast, the overruling of the motion for judgment after the verdict was expressly

assigned as error and the Circuit Court of Appeals has held that it did pass upon that motion in its first opinion.

In *Roth* v. *Hyer,* 142 Fed. (2d) 227, the plaintiffs had sued the defendants for breach of contract. The case was tried without a jury and the District Judge gave judgment for defendants. The plaintiffs thereupon appealed to the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals reversed on the ground that the trial court had erroneously concluded that the defendants had not authorized the making of the contract by their agent. After remand to the District Court the plaintiffs moved for a summary judgment except as to the amount of damages and argued that all other issues in the case had been foreclosed by the opinion in the Circuit Court. The defendants responded by filing affidavits raising additional questions of fact with respect to the authority of the agent. The District Court held that the decision of the Circuit Court of Appeals foreclosed trial of anything but the amount of damages. Upon appeal the Circuit Court of Appeals held that this was error, pointing out that on the appeal the plaintiffs had asked the Circuit Court to direct the entry of a final judgment in its favor on the issue of liability, and that the Circuit Court of Appeals on the first appeal had denied this motion. *Roth v. Hyer,* 142 Fed. (2d) 227, 228-229. The *Roth* case, therefore, unlike this case, involved an express decision by the Circuit Court of Appeals in the first instance that it would not direct the entry of a judgment for the appellant.

In *Fleniken* v. *Great American Indemnity Company,* 142 Fed. (2d) 938, the plaintiff brought a suit for damages for personal injuries against the defendant as the insurer of the liability of a carrier. The defendant's motion for a directed verdict was overruled and the jury returned a verdict for the plaintiff upon which judgment was entered. On appeal the Circuit Court of Appeals for the Fifth Circuit held that upon the undisputed facts the insurer was not liable as a

matter of law and that its motion for a directed verdict should have been granted. Upon remand the District Court on motion of the defendant, without notice to the plaintiff, set aside the former judgment and entered judgment for the defendant on the motion for a directed verdict. Upon appeal the Court of Appeals held that this course of action by the District Court was improper. It did so, however, on the ground that it was error for the District Court to enter the judgment for the defendant without giving the plaintiff an opportunity to present objections. The Court of Appeals said, 142 Fed. (2d) 938, 939:

> "The reversal on appeal of said final judgment, ~~with a remand for said final judgment~~, with a remand for further and not inconsistent proceedings, did not reinstate the motion of defendant for a directed verdict and, in the alternative, for a new trial, which motion had been overruled before the appeal was taken. *It was within the discretion of the court below to allow that motion to be renewed and to rule on it, but this should not have been done without giving the parties a hearing. The plaintiff was entitled to present his objections to such procedure and to ask for a trial de novo.*" (Italics supplied)

In the instant case the respondent did renew its motion for judgment notwithstanding the verdict and the plaintiff was given the full opportunity to present its objections. The opinion of the Circuit Court of Appeals for the Fifth Circuit in the *Fleniken* case recognizes that had the District Court there followed the course that was followed in the instant case by the District Court the entry of the judgment for the defendant would have been proper.

The only decision by a Circuit Court of Appeals dealing with a situation at all analogous to the present case is *Herzberg's, Inc.* v. *Ocean Accident and Guarantee Corp.*, 132 Fed. (2d) 438 (CCA 8th, 1943), and that case is in accord with the decision of the Circuit Court of Appeals here. There the plaintiff had sued the defendant upon an insurance policy. The case had been tried before the District Court for the District of Nebraska without a jury. The

court had entered judgment for the plaintiff and the defendant had appealed. The Circuit Court of Appeals for the Eighth Circuit held, as a matter of law, that the loss sought to be recovered was not covered by the terms of the insurance policy and remanded the case "for further proceedings not inconsistent with the opinion" of the court. *Herzberg* v. *Ocean Accident and Guarantee Corp.*, 132 Fed. (2d) 438, 440. Upon remand, the plaintiff moved for leave to file an amended complaint and for a new trial. The lower court granted this motion and retried the case. Upon the new trial, judgment was entered for the defendant and plaintiff appealed. The Circuit of Appeals for the Eighth Circuit affirmed the judgment of the lower court and stated in its opinion that it had been error for the District Court to retry the case. The Court said, 132 Fed. (2d) 438, 440-441:

> "A majority of this Court thinks that, while the opinion and mandate on the former appeal of this case did not specifically direct the entry of judgment in favor of the defendant, the effect of the mandate, of which the opinion was a part (*Pike Rapids Power Co. Minneapolis, St. P. & S. S. M. R. Co.*, 8 Cir. 106 F 2d 891, 894), was to require that to be done, since every issue of law and fact raised by the pleadings had then been decided and nothing remained to be done except for the trial court to determine the costs that the defendant was entitled to recover and to enter judgment in favor of the defendant with costs. The majority is of the opinion that the former decision of this Court terminated this case for all purposes; that thereafter, the complaint was not subject to amendment without express leave from this Court (compare, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 8 Cir. 121 F. 2d 561); and that if the amendment of the complaint had any effect at all, it constituted the commencement of a new and independent action, which, at the time the amendment was made, was barred by the statute of limitations of the State of Nebraska. The majority regards the amendment to the complaint and the proceedings subsequent thereto as an ineffectual attempt to circumvent a decision of this Court which was completely determinative of this case. This is not

a case like *Northern Pacific Ry. Co.* v. *Van Dusen Harrington Co.*, D. C. 34 F. 2d 786, 787, or *Millers' Mutual Fire Ins. Ass'n. of Illinois* v. *Bell*, 8 Cir., 99 F 2d 289, 291, in which, after a judgment of a trial court had been reversed by this Court, issues of fact remained open and a new trial was in order."

* * *

"One member of this Court thinks that the opinion and mandate of the former appeal did not require the entry of judgment for the defendant, since no such direction was contained in the mandate; that the trial court therefore had discretionary authority * * *".

It should be noted that even under the minority view expressed in that case, the trial court could have properly held, as it did in this case, that the opinion of the Circuit Court of Appeals on the controlling question of law made a new trial unnecessary.

In the *Herzberg* case the Circuit Court of Appeals for the Eighth Circuit referred to the fact that the case had been tried without a jury, but in view of the provisions of Rule 50b and the decision of this Court in *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654, the fact that no jury verdict was involved in the *Herzberg* case is not material to the point now under discussion. The case shows that if an appellate court, upon review of the whole record, decides a question of law that precludes recovery, it may properly construe its mandate as directing the entry of a judgment for the defendant, even though the mandate is expressed in general terms and contains no such specific direction.

III.

The decision of the Circuit Court of Appeals in this case is not in conflict with the decisions of this Court, nor does it sanction departures from existing and approved procedure. Petitioner argues that it should have been granted a new trial upon remand so that it could have a second opportunity to present evidence that might make out a case that would permit recovery. The opinion of the Circuit Court of

Appeals on the first appeal in this case held that the plaintiff was barred as a matter of law from recovery because of the decedent's contributory negligence. This holding was based upon the facts with respect to the physical circumstances of the accident. In considering these facts, the Court of Appeals stated that it took "the most favorable and charitable view of deceased's action" and that it accepted "the *estimate* of plaintiff's witnesses rather than the *measurements* of defendant's witnesses." *Moss* v. *Pennsylvania Railroad Co.*, 146 Fed. (2d) 673, 677. Physical facts do not change. The petitioner in this case has not pointed to or suggested any specific evidence that she wishes to offer on the issue of contributory negligence. The record discloses that the issue of contributory negligence was fully tried on the facts in the first instance. The District Court in this case after the remand considered the plaintiff's request that she be given a new trial and decided, in view of the opinion of the Circuit Court of Appeals, that a new trial would serve no useful purpose (R. 4-5). The petitioner has had the benefit of the trial Court's judgment on the effect of the decision of the Circuit Court of Appeals on the petitioner's case and on her right to a new trial. Compare *Cone* v. *West Virginia Pulp and Paper Co.*, No. 184, October Term, 1946, decided March 3, 1947.

The trial court correctly concluded that one of the purposes of Rule 50b was to avoid unnecessary retrials when the trial court erroneously overrules a motion for a directed verdict. If, after an appellate court has held that as a matter of law the plaintiff is not entitled to recover, the plaintiff is entitled as a matter of right to a second trial, the same conclusion would appear to follow in the case of a second or third appeal. Under such a rule, litigation would be interminable.

To support its argument that the decision of the Circuit Court of Appeals departs from existing procedure and deprives petitioner of its right to a jury trial, petitioner relies heavily upon *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364. That case, which was decided in 1913, held

only that if defendant's request for directed verdict was denied without any reservation and the verdict of the jury was thus taken unconditionally and not subject to the Court's reserved ruling on the sufficiency of evidence, an appellate court could not direct the entry of a judgment for the defendant. Under Rule 50b of the Rules of Civil Procedure, it is now unnecessary for the trial court to reserve its ruling on a motion for a directed verdict. See *Montgomery Ward Co.* v. *Duncan,* 311 U. S. 243.

In *Baltimore and Carolina Line* v. *Redman,* 295 U. S. 654, this Court held, even before the promulgation of Rule 50b, that if the trial court reserved its ruling on a motion for a directed verdict and took the verdict of the jury subject to that reservation, and thereafter an appellate court held that the evidence was insufficient, the appellate court could direct the entry of a judgment for the defendant without infringing the right to a jury trial conferred by the Seventh Amendment. The Court in that case not only distinguished the *Slocum* case but expressly said that to the extent that the opinion in the *Slocum* case contained statements that were inconsistent with the result in the *Baltimore and Carolina* case, those statements "must be regarded as qualified by what is said in this opinion." *Baltimore and Carolina* v. *Redman,* 295 U. S. 654, 661.

CONCLUSION.

For the reasons that have been stated above, it is submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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